UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 400, CLC (KROGER STORE NO. 755),	)	
and	)	**Case 06-CB-222829**
SHELBY KROCKER.	)	

UFCW LOCAL 400's ANSWERING BRIEF TO THE EXCEPTIONS OF THE GENERAL COUNSEL AND THE CHARGING PARTY

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Introduction

Respondent United Food and Commercial Workers, Local 400 ("Local 400" or the "Union") is the exclusive representative for employees in a bargaining unit of Kroger grocery stores in West Virginia. Bargaining unit employees who wish to join the union indicate their interest by filling out a document that invites them to make separate, voluntary contractual commitments regarding union membership, payroll deductions for dues, and payroll deductions for contributions to political candidates. The dues checkoff authorization describes the process for the renewal of an employee's commitment to paying union dues by payroll deduction and provides for the continuation of an employee's checkoff commitment if the employee begins working for another employer covered by Local 400's contract.

As the stipulated facts establish, on September 2, 2017, Shelby Krocker, the Charging Party, executed an application to join Local 400 and voluntarily authorized payroll deductions for union dues. Ms. Krocker did not elect to authorize payroll deductions for contributions to political candidates.

On March 5, 2018, Ms. Krocker sent a letter to Local 400 withdrawing from union membership and requesting to revoke her dues checkoff authorization. Local 400 honored her request to withdraw from union membership. Because Ms. Krocker sent her letter at a time when the terms of her checkoff authorization did not provide for revocation, Local 400 sent her a copy of her checkoff authorization and notified her about her anniversary date and the period when she could next revoke her checkoff authorization. Despite Ms. Krocker's clear obligation to continue paying dues, Local 400 later released Ms. Krocker from her obligation and refunded the entire amount of dues she alleged she was owed.

As Administrative Law Judge Robert Giannasi correctly found, the General Counsel's Complaint sets forth allegations that are supported neither by the facts nor relevant legal authority. Most of the complaint allegations focus not on Local 400's actions, but the plain language of the authorizations used by Local 400. The Administrative Law Judge, following longstanding Board precedent, correctly found that there is no Board law supporting the General Counsel's theory that the run-of-the-mill checkoff authorization at issue in this case was facially unlawful and dismissed the unfair labor practice allegations.

The Board should adopt the findings and decision of ALJ Giannasi and reject both the General Counsel's and the Charging Party's exceptions. In addition, the Board should reject the General Counsel and the Charging Party's invitations to change Board law to invalidate the ordinary checkoff authorization form at issue in this case.

Statement of Facts

The parties stipulated to a record in this case. The Union is the exclusive representative for employees in a bargaining unit of Kroger grocery stores in West Virginia. (Stipulated Record, at ¶ 15). As described above, employees of Kroger who wish to sign up for membership in the Union are given the option of signing three separate authorizations: a "Membership Application," a "Voluntary Check-off Authorization," and a "UFCW Local 400-ABC Payroll Deduction Authorization Form." (Exhibits 3 and 6). Each authorization requires an employee to affix their signature and the date to that part if the employee wants that part to apply to them. (Exhibit 3). On September 2, 2017, Ms. Krocker signed the "Membership Application" and the "Voluntary Check-Off Authorization." (Exhibit 3). Ms. Krocker chose not to sign the "UFCW Local 400-ABC Payroll Deduction Authorization Form" for voluntary political donations. (Exhibit 3).

On March 5, 2018, Ms. Krocker sent a letter to Local 400 withdrawing from Union membership and requesting to revoke her dues checkoff authorization. (Exhibit 4). Local 400 accepted Ms. Krocker's membership withdrawal, notified her of the window period during which she was able to withdraw her dues checkoff authorization, and provided her a copy of the authorization card she had signed. (Exhibit 5). In September 2018, Local 400 refunded Ms. Krocker the total amount of dues collected from her since the date of her March 5, 2018 letter. (Stipulated Record, at ¶ 17(c)). In late 2018, Local 400 also revised its form containing the three separate authorizations. (Stipulated Record, at ¶ 18). The revised form no longer contains the words "Must Be Signed." (Exhibit 6). It also contains darker lines between each separate authorization. (Exhibit 6).

Assisted by the Right to Work Committee, Ms. Krocker filed a charge against Local 400 alleging that Local 400's authorization card had violated her rights under the Act. The Regional Director for Region 6 dismissed the charge on September 28, 2018. (Exhibit 1(c)). The National Labor Relations Board Office of Appeals reversed the Regional Director's decision to dismiss the charge. (Stipulated Record, at ¶ 3). The Complaint issued on September 27, 2019. (Stipulated Record, at ¶ 5).

The parties stipulated that the issue to be determined in this case was whether Local 400's actions and authorization forms had "restrained and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act." (Stipulated Record, at ¶ 19). Despite this clear stipulated statement of the issue, the General Counsel argued for the first time that Local 400 also violated the duty of fair representation it owed to Ms. Krocker. After briefing by the parties and upon the facts stated in the Stipulated

Record, Administrative Law Judge Robert Giannasi found that Local 400 "ha[d] not violated the Act in any way." (ALJD, at 10:14).

Argument

The Administrative Law Judge thoroughly analyzed and completely rejected the General Counsel and Charging Party's allegations and dismissed the complaint. The Board should adopt his well-reasoned decision.

I. Ms. Krocker's Request To Withdraw Her Voluntary Dues Checkoff Was Untimely, But Local 400 Nevertheless Accepted It

The exceptions allege that Local 400 violated the Act by writing to Ms. Krocker, describing the window period in the voluntary dues checkoff authorization she signed, and explaining that she was not timely in requesting to revoke her dues checkoff authorization. (Exhibit 5) (ALJD, 3:19-26). The ALJ rejected this allegation, noting:

> As Respondent points out, at the appropriate time, Respondent not only permitted the revocation, but reimbursed the Charging Party all dues paid from the date of her revocation letter, even though the revocation would only have been valid as of a later date. Thus, the essence of the alleged violation—notification of the specific dates in the window period—was cured; indeed, more than cured.

(ALJD, 10 n.8).

Local 400 released Ms. Krocker from her dues checkoff authorization obligations and refunded her the total sum of money she alleged was owed. (Stipulated Record, at ¶ 17(c))(ALJD, 3:30-31). It is clear that the exceptions do not present any case or controversy to be decided, since Ms. Krocker has now recovered everything she might have possibly wished to recover. The exceptions to the ALJ's decision are moot.

II. Local 400 Provided Ms. Krocker With Information That Enabled Her to Easily Determine When Her Next Opportunity to Revoke Her Checkoff Authorization Would Occur

Upon Ms. Krocker's request, it is undisputed that Local 400 promptly provided her with a copy of the authorization card she signed and notified her of the window period during which she could withdraw her dues checkoff authorization. The specific dates when Ms. Krocker could revoke her checkoff authorization were easily ascertainable because her checkoff authorization was dated. The Charging Party and the General Counsel assert that Local 400 violated the Act (and its duty of fair representation) because it did not provide Ms. Krocker with the specific dates she could withdraw her authorization. The ALJ correctly rejected the GC and Charging Party's assertions, holding that "No case law is cited in support of this affirmative duty[]" to provide specific dates. (ALJD, 9:47-10:48). He explained:

> It is hard to see how there can be any restraint or coercion in failing to spell out such specific dates, especially since it does not require a degree in mathematics to compute the specific appropriate dates from the authorization itself. Nor is there here the type of misrepresentation or bad faith in such failure that would bring into play a violation of the duty of fair representation.

(ALJD, 10:5-9).

There is no authority that requires a union to provide the specific dates during which an employee may withdraw their checkoff authorization, especially where a Union provides the employee with both the authorization card they signed and describes the window period for the employee, as is the case here. Under these facts, the Board should adopt the ALJ's decision.

III. The Words "Must Be Signed" Are Not A Violation Of The Act, But Local 400 Removed Them From Its Voluntary Dues Checkoff And Voluntary Membership Forms In Any Event

The exceptions regarding the words "Must Be Signed" also fail to present an existing case or controversy because Local 400 has removed the allegedly offending language from its

voluntary checkoff authorizations. (Exhibit 6). When Local 400 removed that language, it rendered the allegations and exceptions regarding that language moot. Furthermore, the words "Must Be Signed" were in no way coercive but instead serve to reinforce the requirements of Section 302 of the Labor Management Relations Act, 29 U.S.C. 186, and state law requirements regarding paycheck deductions. The requirement of Section 302(c)(4) of a "written" authorization is not mere surplusage. Thus, a verbal authorization, for instance, (or marking the dues form with an "x") to deduct dues would certainly not be effective as a "written" authorization for purposes of 302(c)(4) or under West Virginia law. The ALJ was correct in explaining:

> There was no coercion either in the language on the form or extraneously in a separate communication. Moreover, as Respondent points out, a West Virginia statute requires that authorizations for deductions from employee pay must be in written form. That benign objective reasonably explains the "Must Sign" language.

(ALJD, 7:5-8).[1] There is nothing "coercive" about a requirement that a "written authorization" be in writing, and there is no statutory or case law to the contrary.

IV. The Form Of Local 400's Authorizations Is Lawful

It is not an unfair labor practice for the Union—for the sake of convenience—to put three separate authorizations on a single piece of paper as long as the authorizations require separate signatures, which is the case here. As the ALJ correctly held,

> As to the alleged confusing language and format in the three-part form, I find that there is nothing confusing in the use of the form and certainly not enough to amount to restraint or coercion. The three-part format is an efficient way to obtain the necessary information from employees on multiple related matters. And the requirements are sufficiently differentiated so employees can reasonably

[1] Moreover, there are substantial penalties under West Virginia law for a successful lawsuit, including treble damages. See W. Va. Code § 21-5-5d.

> distinguish the separate authorizations necessary. I can see no violation in either the original or the subsequent three-part form whether it is alleged as restraint or coercion or a violation of the duty of fair representation.

(ALJD, 7:12-19).

There is no reason whatsoever why the existing law should be changed or that the form of Local 400's authorizations is problematic in any way. As mentioned above, Ms. Krocker only signed two of three parts of the form, demonstrating that she was not confused by the format and understood that each authorization was separate and voluntary. And, in any event, Local 400 changed the form of its authorizations to add dark lines to the form, an action which eliminates any case or controversy here. (Exhibit 6). The Board should uphold the ALJ's finding that the form of Local 400's authorizations was valid and lawful.

V. Board Law And Common Sense Support The Transferability Of Check-off Authorizations

Citing ample authority, the ALJ held that

> In these circumstances, particularly where there is no violation of Section 302(c)(4), there is really is no support for the General Counsel's allegation that the transferability language in the checkoff authorization signed by the employees, by itself, amounts to restraint or coercion or a violation of the duty of fair representation.

(ALJD, 9:25-28).

Applicable case law supports the transferability of check-off authorization from employer to employer. In *Associated Builders and Contractors v. Carpenters Vacation and Holiday Trust Fund*, 700 F.2d 1269, 1276 (9th Cir. 1983), which was also cited by the ALJ (ALJD, 9:14-17), the court found that a provision in dues checkoff form which allowed transfer of the checkoff authorization to different employers is a "reasonable adaptation" of the requirements of Section 302(c)(4). Similarly, in the Advice Memo in Case No. 16-CB-6028 (2001) (*Kroger # 609*), the

General Counsel examined the issue of the transferability of check-off authorizations to future employers. Relying on *Kroger Co.*, 334 NLRB 847 (2001), another case discussed by the ALJ here (ALJD, 8:44-47-9:1-2), the General Counsel found that the checkoff authorization card in question validly transferred to an employee's new employer, an employer that was different from the one at which she was employed when she signed the authorization card. Advice Memo, Case No. 16-CB-6028, at *2. There, the checkoff authorization read that the Union was "further authorized to transfer this authorization to any other Employer under contract with Local 455 in the event that I should change employment." *Id.* at *1. The General Counsel noted the traditional admonition that "disputes involving dues-checkoff provisions essentially involve contract interpretation rather than interpretation and application of the Act." *Id.* at *2 (*citing Furr's, Inc.*, 264 NLRB 554, 556 (1982)). And the General Counsel found that the language in the dues checkoff authorization "constitute[d] a clear and unmistakable waiver in the dues-checkoff authorization itself . . ." such that the charging parties' checkoff authorization could be transferred to her new employer. *Id.*

In today's work environment (and particularly in the retail food industry), employees change jobs or transfer to different employers with increasing frequency. It is impractical not to have an easily transferable dues authorization to employers who have a contract with Local 400. Moreover, there is nothing that either excepting party has identified which would make a transferred authorization problematic. As the Court in *Associated Builders and Contractors*, 700 F.2d at 1276, noted, nothing in Section 302(c)(4) requires that an employee be free to revoke their voluntary dues authorization whenever they change employment.

The plain language of Local 400's authorization card is clear regarding its transferability to the same or new employers: Local 400 is "further authorized to transfer this authorization to

any other Employer under contract with Local 400 in the event that I should change employment or to the same employer if I return to work after hiatus." (Exhibit 3). Despite this clear language and the clear law on the matter, the exceptions insist that maintaining a check-off authorization that is transferable somehow constitutes an unfair labor practice. Making the exceptions even more mystifying, there is no allegation that Local 400 has ever attempted to enforce the transfer language against Ms. Krocker, let alone any other employee. That is, the General Counsel and the Charging Party are again claiming that the language of the authorization itself, not any action by Local 400, is an unfair labor practice. The exceptions regarding transferability should be rejected. *Cf. Int'l Brotherhood of Electrical Workers Local 2088 (Lockheed Space Operations)*, 302 NLRB 322, 329 (1998) (where there is "[e]xplicit language within the checkoff authorization clearly setting forth an obligation to pay dues" under specified circumstances, the Board assumes that "employees signing checkoff authorizations are fully aware of what they are agreeing to do").

VI. The Language "whichever occurs sooner" Is Not Confusing Or Ambiguous—It Is Drawn Directly From The Statute Authorizing Dues Checkoff

Of the several different and novel allegations in this matter, none is as perplexing as this one—that the language regarding the revocation window in the checkoff authorization or any other part of Local 400's authorizations is so "confusing" or "ambiguous" as to violate the Act. The ALJ rejected the notion that Local 400's authorization cards were confusing or ambiguous in any way, stating:

> I cannot accept the General Counsel's assertion that language ambiguity alone in union communications or documents amounts to either a violation of the duty of fair representation or restraint or coercion under Section 8(b)(1)(A). But, in any event, the union's language in this case is not ambiguous—at least not so ambiguous as to amount to unlawful restraint or coercion or bad faith. Nor is it

> anywhere near the conduct found unlawful in the cases cited by the General Counsel.

(ALJD, 6:4-9).

Local 400's dues checkoff authorization form informs employees that they may revoke their authorization during the window period prior to their anniversary date or the expiration of the contract, whichever occurs sooner. (Exhibits 3 and 6). The ALJ explained why this is an appropriate phrasing for an authorization card:

> Indeed, the statute itself uses the phrase "whichever occurs sooner," a phrase that is necessary because the statute sets forth 2 different annual periods for proper revocations. It is thus natural for the authorization to likewise refer to 2 different annual periods for proper revocations. When read in context the meaning of the alleged objectionable language is plain, reasonable and in no way impermissible.

(ALJD, 8: 26-30).

As the ALJ noted, Local 400's card uses language that is taken directly from Section 302 of the Act. *See* 29 U.S.C. 186(c)("Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner . . .")(emphasis added). If the General Counsel and Charging Party believe this particular language is confusing or ambiguous, their quarrel is with Congress, not Local 400.

The ALJ's findings are consistent with decades of administrative materials and Board law accepting as standard exactly the sort of language used in Local 400's authorizations. The Board has repeatedly approved of authorizations that are arguably more complicated than the one at issue here. The Board has also repeatedly upheld checkoff authorizations that are virtually the same as—and certainly no more or less confusing than—the language used in Local 400's

checkoff authorization. *See United Steelworkers Local 4671(National Oil Well)*, 302 NLRB 367, 368, 370 (1991)(dismissing complaint brought against union for attempting to enforce checkoff language substantially similar to the language here); *Schweitzer Local 1752 (Schweizer Aircraft Corporation)*, 320 NLRB 528, 529, 532 (1995)(same). In addition, the Department of Justice examined approvingly language that was nearly the same as the one here in Justice Department's Opinion on Checkoff, 22 LRRM 46 (1948)(advising that Justice Department will not prosecute for a Section 302 violation where a checkoff clause automatically renews from year to year with a 10-day "escape" period). Likewise, in *Major Collective Bargaining Agreements: Union Security and Dues Checkoff Provision*, U.S. Department of Labor, Bureau of Labor Statistics, 32-35 (May 1982), the Bureau of Labor Statistics reviewed dozens of collective bargaining agreements covering hundreds of thousands of workers. Those authorizations were substantially similar to the one used by Local 400, including the "whichever comes sooner" language that tracks Section 302(c)'s own wording. *Id.*

There is absolutely no evidence in this case that the Charging Party herself was "confused" about the right to revoke in the window period prior to the contract expiration date or that she could not understand the plain and simple language on the dues checkoff form. In addition, neither Ms. Krocker nor anyone else sought to revoke the authorization at the termination of a collective bargaining agreement or on their anniversary date. Because there is no case law supporting the General Counsel's novel claims and because the case law that does exist contradicts those claims, the Complaint should be dismissed.[2]

[2] This case is similar to another case in which the Sixth Circuit Court of Appeals found that there is no private right of action for individuals to bring civil claims alleging a breach of Section 302. *Ohlendorf v. United Food and Commercial Workers, Local 876*, 883 F.3d 636, 639 (6th Cir. 2018). In *Ohlendorf*, the Right to Work Committee (which represents the Charging Party here) attempted to bring a claim that a union had breached its duty of fair representation by enforcing the language on its authorization card. *Id.* The court rejected the the Right to Work Committee's

VII. Local 400 Did Not Breach Its Duty of Fair Representation

The Charging Party did not allege in its charge that Local 400 breached its duty of fair representation. As the ALJ pointed out, the General Counsel did not allege in the Complaint that Local 400 breached its duty of fair representation. (ALJD, 5 n.3). The General Counsel also did not raise breach of the duty of fair representation in its response to Local 400's motion for a bill of particulars. (Exhibit 1(n)). The parties' stipulated statement of the issue in this case does not raise a breach of the duty of fair representation. The General Counsel did not even raise the duty of fair representation in its opening brief to the administrative law judge. The General Counsel had ample opportunity to include this allegation in its pleadings, but he did not. It was not until its reply brief to the ALJ that the General Counsel decided, in passing, to add the novel theory that Local 400 violated the duty of fair representation. Because it failed to raise the issue (until a point at which Local 400 could no longer respond before the ALJ), the General Counsel should not be permitted to advance the issue now.

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novel theory of recovery because it could not produce any real breach of the duty of fair representation. *Id.* at 644. Since they had no other underlying claim, the court held that the Right to Work Committee was engaged in a naked attempt at creating a private right of action for alleged violations of Section 302. *Id.* at 639.

Despite the fact that the General Counsel does not suggest here that the Board has direct jurisdiction over Section 302 claims, the lessons of *Ohlendorf* apply to the Complaint in this case. Like the Right to Work Committee in *l*, the General Counsel targets the language of the parties' agreement regarding dues checkoff, not any action. And like the plaintiffs in *Ohlendorf*, there is no allegation that anybody forced the charging party here to sign an authorization card. There are certainly no allegations here that the Union engaged in misrepresentation, fraud or dishonesty. There is only an allegation that the card and its language was "confusing." There is simply nothing in the Complaint here that would even suggest that Union engaged in any coercive act. Like the plaintiffs in *Ohlendorf*, the General Counsel is left only with a naked complaint that Local 400 violated Section 302. Because the Board has no jurisdiction over such complaints, the Complaint should be dismissed.

Notwithstanding the General Counsel's failure to raise the fair representation issue, there are no facts or precedent that support such a theory in this case. As the Administrative Law Judge held,

> [T]he General Counsel's position is nowhere supported in the case law cited in the brief or even in the duty of fair representation itself. As indicated above, a union fails in its duty of fair representation if it acts in a manner that is arbitrary, discriminatory or in bad faith, the latter having an intent or motivational aspect to it.

(ALJD, 5:11-14). There is not a single fact in the stipulations that suggests that Local 400 acted toward Ms. Krocker in bad faith. Instead, when Ms. Krocker requested to be released from her contractual obligations, Local 400 promptly provided Ms. Krocker with her anniversary dates and the actual authorization card that she signed. No existing Board or court law required Local 400 to do anything more.

The General Counsel bases his duty of fair representation allegation entirely on the language in the authorizations. The General Counsel's theory is that because the authorization form was unclear, Local 400 acted in bad faith by drafting it. Unlike in cases like *Electrical Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031, 1037 (1993), enf. denied 41 F. 3d 1532 (D.C. Cir. 1994), cited by the General Counsel, Local 400 did not make any misrepresentations or omissions. Instead, Local 400 drafted its checkoff authorization form in accordance with decades of case law and administrative materials. Here, as in *IUE v. NLRB*, 41 F.3d at 1538, "[t]here is not one iota of evidence indicating 'egregious,' 'invidious,' or 'improperly motivated conduct'" on the part of Local 400 in this case. The exceptions should be dismissed.

VIII. The Issue of Revocation of a Checkoff Authorization During the Hiatus Between Collective Bargaining Agreements is Not Presented Here

The charging party asserts that her checkoff authorization "violates the Act by not giving employees an opportunity to revoke during a contract hiatus." (Charging Party, Brief In Support of Exceptions, 12). In this regard, the charging party argues that "[t]he ALJ erroneously failed to consider the General Counsel's allegation that the Union's checkoff unlawfully limits employees' ability to revoke at the expiration of a collective bargaining agreement to a short window period prior to contract expiration." *Ibid*.

Notably, the General Counsel does *not* assert that the ALJ failed to consider any allegation to this effect. In fact, the General Counsel did not–and could not–make any such allegation in this case, because the Charging Party did not make any attempt to withdraw her checkoff authorization during a contract hiatus. Insofar as the General Counsel's complaint says anything about revoking a checkoff authorization "during any period in which no collective-bargaining agreement is in effect," it is to demonstrate that the Union-provided form "[d]oes not contain clear language informing signors when they may revoke." Complaint ¶ 9(c).

The General Counsel continues to press his theory that a union commits an unfair labor practice by providing checkoff authorization forms that do not "use plain language to designate when revocation requests can be made." (General Counsel, Brief in Support of Exceptions 32). It is in this regard that the General Counsel expresses his disagreement with the majority opinion in *Frito-Lay*, *Inc*., 243 NLRB 137 (1979). (*Id*. at 30). But *Frito-Lay* had nothing to do with the union's supposed duty "to provide an employee with her specific dates for revocation." (*Ibid*.)

Frito-Lay involved the rejection of checkoff revocations that were made "during the hiatus between the expiration of the old contract and the execution of the new agreement." 243 NLRB at 137. What divided the majority and dissenting Board members was whether this

conduct by the employer and the union violated the Act. There was no discussion whatsoever of any duty to ensure that "employees clearly understand the exact date or dates when revocation requests can be submitted." (General Counsel, Brief in Support of Exceptions 31).

In short, the issue decided in *Frito-Lay* was not presented by the General Counsel's complaint in this case and could not have been presented because the Charging Party did not attempt to revoke her authorization during a hiatus between agreements.

Conclusion

The exceptions are not supported by either the facts of this case or applicable legal authorities. The Board should adopt the ALJ's Decision and Order dismissing the Complaint.

Respectfully submitted,

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